SUPREME COURT U.S.
OCT 18 2002
OFFICE OF THE CLERK

No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ET AL.,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AARP, LEGAL COUNSEL FOR THE ELDERLY, INC., NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE BRENNAN CENTER FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

JOHN H. PICKERING
SETH P. WAXMAN
Counsel of Record
STEPHEN W. PRESTON
JODY MANIER KRIS
JONATHAN H. SIEGELBAUM
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae
AARP, LCE, NLADA and the Brennan Center for Justice

(ADDITIONAL COUNSEL LISTED ON INSIDE COVER)

BEST AVAILABLE COPY

Of Counsel
STUART R. COHEN
ROCHELLE BOBROFF
AARP FOUNDATION LITIGATION

–and–

MICHAEL SCHUSTER
AARP
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
Counsel for Amicus Curiae AARP

DONALD M. SAUNDERS
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-0620

–and–

LINDA E. PERLE
CENTER FOR LAW AND SOCIAL POLICY
1015 15th Street, NW
Suite 400
Washington, D.C. 20005
(202) 906-8002
Counsel for Amicus Curiae NLADA

BURT NEUBORNE
DAVID S. UDELL
LAURA K. ABEL
CRAIG SIEGEL
BRENNAN CENTER FOR JUSTICE AT NYU LAW SCHOOL
161 Avenue of the Americas, 12th Floor
New York, N.Y. 10013
(212) 998-6720
Counsel for Amicus Curiae Brennan Center for Justice

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. IOLTA PROGRAMS PROVIDE MEANINGFUL ACCESS TO JUSTICE FOR THE POOR. 7

A. Vulnerable People Across The Nation Rely On IOLTA Programs. 8

B. The Substantial Contribution Of IOLTA 11

1. IOLTA Programs Rank Among The Largest Sources Of Funding Of Legal Services For The Poor. 11

2. IOLTA Funds Help Thousands of Low-Income Individuals And Families. 13

3. IOLTA Subsidizes Delivery Models Uniquely Suited To Serving The Poor. 18

4. The Particular Importance Of IOLTA Funds As Compared To Other Funding Sources. 19

C. Without IOLTA, Alternative Sources Of Funding Will Be Inadequate To Meet The Legal Needs Of The Elderly And Poor. 20

1. Client Needs Cannot Be Met By Private Donations Alone. 21

TABLE OF CONTENTS—Continued

Page

2. Legal Services Without IOLTA: The Indiana Example. 23

D. The Dangers Of Leaving Substantial Populations Without Access To Justice. 25

II. THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT PROVIDES NO REMEDY TO PETITIONERS. 26

CONCLUSION 28

APPENDIX A: Letter survey from Don Saunders, Director of Legal Services, NLADA to IOLTA Program Directors, dated July 22, 2002 ..... 1a

APPENDIX B: List of survey respondents 5a

APPENDIX C: Solicitation letter from Daniel J. Popeo, General Counsel, Washington Legal Foundation, dated September 4, 2002 .....9a

TABLE OF AUTHORITIES

CASES

Page(s)

In re Interest on Lawyers' Trust Accounts, 672 P.2d 406 (Utah 1983).....8

In re New Hampshire Bar Ass'n, 453 A.2d 1258 (N.H. 1982).....8

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 4

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).....6, 26

STATUTES AND RULES

Pub. L. No. 106-553, 114 Stat. 2762 (2000).....13

Ala. R.P.C. 1.15(g) 7

Alaska R.P.C. 1.15(d).....7

Ariz. Sup. Ct. R. 44(c)(2) 7

Ark. R.P.C. 1.15(d)(2) 7

Cal. Bus. & Prof. Code § 6211(a).....7

Colo. R.P.C. 1.15(e)(2).....7

Conn. R.P.C. 1.15(d) 7

D.C. R. Ct. App. B(a) 7

Del. R.P.C. 1.15(h) 7

Fla. Bar R. 5-1.1 7

Ga. Bar R. 1.15(II).....7

Haw. Sup. Ct. R. 11 7

Idaho R.P.C. 1.15(d) 7

Ill. R.P.C. 1.15(d) 7

Ind. Prof. Cond. R. 1.15(d) 7

Iowa C.P.R. DR 9-102.....7

Kan. R.P.C. 1.15(d)(3).....7

Ky. R.P.C. 1.15.....7

La. R.P.C. 1.15(d).....7

Mass. R.P.C. 1.15 7

Md. Bus. Occ. & Prof. Code Ann. § 10-303 7

Me. C.P.R. 3.6(e)(4) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Mich. R.P.C. 1.15(d)....7
Minn. R.P.C. 1.15(d)....7
Miss. R.P.C. 1.15(d)....7
Mo. R.P.C. 4-1.15(d)....7
Mont. R.P.C. 1.18(b)....7
N.C. Admin. Code. tit. 27, rr. 1D.1301-.1316....8
N.D. R.P.C. 1.15(d)(1)....8
N.J. R. Gen. App. 1:28A-2....8
N.M. R.P.C. 16-115(D)....8
N.Y. Jud. Law § 497....8
Neb. Sup. Ct. R. Trust Accts. 8
Nev. Sup. Ct. R. 217....8
Ohio Rev. Code Ann. § 4705.09(A)(1)....8
Okla. R.P.C. 1.15(d)....8
Ore. C.P.R. DR 9-101(D)(2)....8
Pa. R.P.C. 1.15(d)....8
R.I. R.P.C. 1.15(d)....8
S.C. App. Ct. R. 412....8
S.D. R.P.C. 1.15(d)(4)....8
Tenn. C.P.R. DR 9-102(C)(2)....8
Tex. R.P.C. 1.14....8
Va. Sup. Ct. R. 6:2-1.15....8
W. Va. R.P.C. 1.15(d)....8
Wash. R.P.C. 1.14....8
Wash. R.P.C. 1.14(b)(4)....27, 28
Wis. Sup. Ct. R. 20:1.15....8
Wyo. R.P.C. 1.15....8

BOOKS, ARTICLES & TREATISES

American Bar Association Commission of Interest on Lawyers' Trust Accounts, *IOLTA Handbook* (Jan. 1995, updated July 2002)....11, 13

TABLE OF AUTHORITIES—Continued

Page(s)

Richard C. Baldwin, *Needs and Deeds*, Oregon State Bar Bulletin 11 (Dec. 2000), *available at* www.osbar.org/2practice/bulletin/00dec /feature.htm (last visited Oct. 16, 2002)....9, 11, 26
MacKenzie Carpenter, *Some Charities See Drop in Giving This Year*, Pitt. Post-Gazette, Dec. 24, 2001, at A1....22
Lynne E. Cunningham, *Legal Needs for the Low Income Population In Washington D.C.*, 5 U.D.C. L. Rev. 21 (2000)....8, 9, 10
Grant To Fund Free Legal Services, South Bend Trib., Mar. 14, 2001, at D2....24
Lisa Gubernick, *Giving: The Big Charity Chill*, Wall St. J., Dec. 1, 2000, at W1....22
Mark D. Killian, *Study: Legal Needs Going Unmet*, Florida Bar News (Mar. 15, 1995), *available at* http://www.afn.org/~afn54735/legalneeds1.htm 1 (last visited Oct. 16, 2002)....9
Legal Services Needs Immediate Support, Conn. L. Trib., June 10, 2002....21
William C. Lhotka, *Raising Court Fees Will Help Aid for Poor, Advocates Say*, St. Louis Post-Dispatch, Apr. 8, 2002, at B1....23
Andrew Longstreth, *Charity: Double Dipping*, Am. Lawyer, Dec. 2001, at 25....22
Robert McClelland & Mary F. Kokoski, *Econometric Issues in the Analysis of Charitable Giving*, 22 Pub. Fin. Q. 498 (1994)....22
George Schatzki, *The Survival of Legal Services for the Poor in Connecticut*, 70 Conn. B.J. 313 (1996)....23

TABLE OF AUTHORITIES—Continued

Page(s)

Brad Seligman & Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services*, *available at* http://www.impactfund.org/CyPres2000FED.html (last visited Oct. 16, 2002).....23

Aline Sullivan, *The Heart Is Willing, But the Economy Isn't*, Barron's, Dec. 17, 2001.....22

OTHER AUTHORITIES

ABA National Conference on Access to Justice in the 1990s, *Civil Justice: An Agenda For The 1990s* (June 9-11, 1989), *available at* http://www.abanet.org/legalsevices/downloads/sclaid/access.conf.pdf (last visited Oct. 16, 2002).....10

About the Pro Bono Commission, *available at* http://www.in.gov/judiciary/probono/about.htm l (last visited Oct. 16, 2002).....24

American Bar Association, *Findings of the Comprehensive Legal Needs Study Conducted by the Institute for Survey Research at Temple University for the Consortium on Legal Services and the Public* (1994).....9

Alaska Bar Association website, www.alaskabar.org /index.cfm?id=5268 (last visited Oct. 16, 2002).....12

Arizona Bar Foundation website, www.azbf.org/AZFLSE/legalservices/ioltagrants.cfm (last visited Oct. 16, 2002).....12

The Center on Philanthropy at Indiana University, *Philanthropic Giving Index* (Summer 2002).....21

Colorado Lawyer Trust Account Foundation website, www.coltaf.org/current_grantees.htm (last visited Oct. 16, 2002).....12

TABLE OF AUTHORITIES—Continued

Page(s)

The Idaho Law Foundation website, www2.state.id.us/isb/pub_info/iolta_grants.htm (last visited Oct. 16, 2002).....12

Indiana Bar Foundation, *2001 Annual Report*, http://www.state.in.us/judiciary/probono/attorneys/reports (last visited Oct. 16, 2002).....25

Indiana Bar Foundation, *Annual Report 2001*, *available at* www.inbar.org/content/news/article.asp?art=64 (last visited Oct. 16, 2002).....12

Indiana Pro Bono Commission, *2000 Annual Pro Bono Report and Plan*, *available at* http://www.courts.state.ny.us/pbconvocation/indianapbcommrpt.pdf (last visited Oct. 16, 2002).....25

The IOLA Fund of the State of New York website, *available at* www.iola.org (last visited Oct. 16, 2002).....13

Kentucky Bar Association website, www.kybar.org /KBF_IOLTA/iolta_grant_history.htm (last visited Oct. 16, 2002).....12

Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* (Apr. 30, 2000), *at* http://www.lsc.gov/pressr/EXSUM.pdf.....11, 13

New Hampshire Bar Association website, ww.nhbar.org/sitemap.asp (last visited Oct.16, 2002).....13

Questions and Answers About the Dallas Volunteer Attorney Program, *at* www.lsnt.org/nav/volist.asp.....9

The Spangenberg Group, Inc., *An Assessment of the Unmet Civil Legal Needs of Ohio's Poor* (Sept. 1991), *available at* www.olaf.org/aboutolaf/ourpublications/spangenburg (last visited Oct. 16, 2002).....9, 10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Texas Equal Access To Justice Foundation website, www.txiolta.org/grantees.html (last visited Oct. 16, 2002) 13

U.S. Census Bureau, *Poverty in the United States: 2001*, *available at* http://www.census.gov/hhes/poverty/poverty01 8

United Way/Community Service Council of Central Indiana, *Legal Needs Study of the Poor in Indiana* (Feb. 1992) 9, 10, 23, 24

INTEREST OF AMICI CURIAE[1]

AARP

AARP is a nonprofit membership organization of more than 35 million persons aged 50 and older dedicated to addressing the needs and interests of older Americans. In representing those interests, and to promote the social welfare, AARP seeks: (a) to enhance the quality of life for individuals as they grow older; (b) to promote independence, dignity, and purpose for such individuals; and (c) to improve the image of aging.

Older persons are substantial consumers of legal services. In recognition of the significant needs of our older population for legal services, and realizing that, as a practical matter, low-income older persons have nowhere else to turn for legal assistance, AARP has consistently supported public programs such as the Interest On Lawyers Trust Accounts (IOLTA) programs, which funds legal assistance providers that help many thousands of older persons every year. AARP advocates for adequate funding and support for legal assistance programs at the state level and in litigation nationwide. AARP Foundation – Litigation often serves as co-counsel with attorneys for IOLTA-funded programs.

There is every reason to believe that older persons' needs for legal assistance will increase in the future. The number of persons 60 years of age and older is growing, and the percentage of older persons in the total population is increasing as well. Because legal assistance is necessary when planning one's personal affairs, and is often required to obtain basic necessities such as health care, in-home support

---

[1] In compliance with Rule 37.6 of this Court, amici curiae state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than these amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

services, protective services, and benefits from programs such as Social Security, Supplemental Security Income (SSI), Medicare and Medicaid, the need for legal services for the elderly will rise along with the population increase. Moreover, the elderly comprise a population that is frequently the victim of fraudulent purveyors of goods and services. As the leading organization for older persons in this country, AARP has considerable interest in ensuring that older persons' needs for legal assistance are met.

LCE

Legal Counsel for the Elderly, Inc. (LCE), is a non-profit organization dedicated to providing legal services to low and moderate income older persons in the District of Columbia by training and educating others concerning the legal rights of older persons, and by testing methods of providing free and low cost legal and advocacy services to older persons. Each year, LCE also directly provides free and reduced fee legal services to over 7,000 residents of the District of Columbia, including residents of nursing homes and group homes.

LCE receives funding from a variety of sources including the District of Columbia Bar Foundation, which in turn receives most of its funds through the IOLTA program established by order of the District of Columbia Court of Appeals. LCE uses funds received from the D.C. Bar Foundation to provide low-income older people with legal assistance in the areas of protective services, guardianships, conservatorships, powers of attorney, and related matters for persons with diminished capacity. LCE is also involved with many other legal services providers that receive IOLTA funding, and LCE coordinates its activities and shares expertise with such legal services providers locally and nationally.

NLADA

The National Legal Aid and Defender Association (NLADA), established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor

through the nation's civil legal aid and defender systems. Among NLADA's more than 2000 members are civil legal aid programs and legal services providers who are funded by IOLTA programs in all 50 States, the District of Columbia and the Virgin Islands, including amicus curiae LCE and programs funded by respondent Legal Foundation of Washington.[2] NLADA provides a broad range of technical assistance, communications, training, and advocacy to its members regarding IOLTA-supported programs.

In addition to IOLTA, NLADA members receive funding from a variety of other sources, including the Legal Services Corporation (LSC), the Department of Justice under the Violence Against Women Act, Title III funds from the Area Agencies on Aging under the Older Americans Act, funds from the Department of Housing and Urban Development, state appropriations or filing fee surcharges, local government funds, private contributions and foundation grants. In many instances IOLTA funds are used to leverage these other funding sources by providing required non-federal matches, or as general operating funds for which these other funds cannot be used.

Although funding from LSC is the largest single source of funding for civil legal assistance in the country, IOLTA is the second largest source of funds and in some parts of the country rivals LSC funding. Approximately 90 percent of IOLTA funds go to support programs, most of which are operated by members of NLADA, that provide civil legal services to the poor. Without IOLTA funding, the vast majority of NLADA's members would have to severely curtail their legal services to low-income Americans, and in many instances would have to shut their doors completely.

---

[2] A complete list of organizations that received grants from the Legal Foundation of Washington in 2002 may be found at www.legalfoundation.org/2002/recipients.htm.

NLADA has accordingly supported IOLTA programs across the country, including Respondent Legal Foundation of Washington, and has worked with its members as well as with amici curiae National Association of IOLTA Programs and the American Bar Association to ensure the continuation and expansion of IOLTA programs because so many of its members depend on IOLTA funding for their support.

Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law unites scholarship, public education, and legal action to find innovative and practical solutions to intractable problems in the areas of democracy, poverty, and criminal justice. Its interest in this case stems from its Access to Justice Project, which works to enable low-income individuals, families, and communities to effectively protect their legal rights. Focusing on eliminating barriers that interfere with the legal representation of low-income persons in civil matters, the Project conducts research, produces public education materials, promotes communication and coalition-building, provides legal counseling and engages in litigation on behalf of a broad network of legal services clients, advocates, and funders.

The Brennan Center appeared before this Court two years ago on behalf of legal aid lawyers and clients in *Legal Services Corp.* v. *Velazquez*. In that case, the Court noted that legal aid lawyers are often the only source of assistance for individuals whom the government has wrongly deprived of public benefits: "[t]here often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits." 531 U.S. 533, 546 (2001).

The Brennan Center is participating in this case out of a belief that IOLTA programs provide an essential source of support for civil legal services, without which hundreds of thousands of low-income people annually would go without legal representation. Without this legal representation, legal

aid clients would be unjustly deprived of food, shelter and other essentials, would be unable to enforce the legal rights guaranteed to them by the Constitution and the laws of our nation, and would be unable to adequately participate in our system of justice.

SUMMARY OF ARGUMENT

Amici agree with respondents that Washington State's IOLTA program does not effect a governmental taking of private property for which just compensation is due. IOLTA exemplifies a creative regulatory program that, against the existing backdrop of banking regulations, deprives clients who seek professional services of nothing, while creating tremendous value for persons with legal needs and without resources to pay for legal assistance. Because the deposit of these funds in nominal amounts or for short terms is a voluntary action by persons seeking professional services, and because such persons could not otherwise expect to obtain returns on such funds, a state may exercise its regulatory authority in the public interest to create new value for the benefit of poor persons, without "compensating" those who would receive nothing of value in the absence of the program.

IOLTA serves the public interest. IOLTA-funded programs have achieved meaningful results for hundreds of thousands of Americans who, by virtue of such programs, have avoided eviction from the only housing available to them, obtained life-saving medical care, realized freedom from abusive spouses, relatives, and institutional caregivers, collected restitution from unscrupulous merchants, and received public services and benefits that enable them to purchase life's basic necessities. Without this source of funding, the citizens ably served by these programs would, in effect, be excluded altogether from participation in our justice system, and would consequently be deprived of any ability to obtain its protection.

ARGUMENT

Amici agree with and join the arguments presented in the briefs for Respondents, as well as in the amicus briefs of the Conference of Chief Justices and the American Bar Association, which demonstrate that IOLTA programs do not give rise to any claim for just compensation. We present, in Section II, several reasons why the multi-factored analysis of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), compels a finding that the character of the government action in enacting IOLTA, when compared to the intangible and negligible interests asserted by Petitioners, requires a judgment that no compensation is due. Before we present these conclusions, we paint a fuller picture of the character of the State's action in enacting IOLTA, by documenting the unmet and growing need for legal services among low-income Americans and presenting compelling evidence of the success of service providers funded by IOLTA programs nationwide in meeting a significant number of those needs.

Anecdotal evidence provided in a survey of NLADA members[3] illustrates how IOLTA funding supplies essential services at the core of our system of justice—enforcing federal and state laws against wrongdoers who violate them; securing judicial orders that award custody or support payments or that restrain persons from exacting violence; enforcing contractual or public entitlements to medical care and other benefits; preventing government from wrongfully seizing or garnishing the property of private citizens; ensuring access to public accommodations for all persons; assuring that minor children are not wrongfully denied public education; preparing wills, guardianship papers, and medical powers of attorney; and providing other basic and critical services

[3] NLADA conducted a survey, *infra* at 13-14, the results of which it has presented in a Lodging Appendix ("Lodging App."), lodged with the Clerk and served upon the parties.

that are routinely available to persons who can afford to pay for them. The early and effective intervention that these legal aid programs can provide forestalls the much larger costs to society of leaving these needs unresolved.

The elimination of IOLTA programs would have drastic consequences for the fulfillment of this country's aspirations to provide a fair and open system of justice, and would produce no corresponding benefit—indeed, no benefit at all—to the Petitioners. Without the funds generated by IOLTA programs, thousands upon thousands of Americans will be left unable to navigate our system of justice. And, without IOLTA programs, the interest payments allegedly "taken" from Petitioners will not be returned to Petitioners for their use. They will simply disappear (as they did prior to the institution of IOLTA programs) into banks and lending institutions all over the country. Such a result contravenes the law and fundamental democratic notions of sound public policy as unanimously formulated in all fifty States and the District of Columbia.

I. IOLTA PROGRAMS PROVIDE MEANINGFUL ACCESS TO JUSTICE FOR THE POOR.

IOLTA programs similar to the Washington State program involved in this case[4] have been adopted by the highest courts or legislatures of all the States,[5] under their supervi-

[4] Although the Washington program involves real estate escrows as well as attorney trust funds, Petitioners agree that the difference is immaterial to the legal analysis. Pet. 15.

[5] Ala. R.P.C. 1.15(g); Alaska R.P.C. 1.15(d); Ariz. Sup. Ct. R. 44(c)(2); Ark. R.P.C. 1.15(d)(2); Cal. Bus. & Prof. Code § 6211(a); Colo. R.P.C. 1.15(e)(2); Conn. R.P.C. 1.15(d); Del. R.P.C. 1.15(h); D.C. R. Ct. App. B(a); Fla. Bar R. 5-1.1; Ga. Bar R. 1.15(II); Haw. Sup. Ct. R. 11; Idaho R.P.C. 1.15(d); Ill. R.P.C. 1.15(d); Ind. Prof. Cond. R. 1.15(d); Iowa C.P.R. DR 9-102; Kan. R.P.C. 1.15(d)(3); Ky. R.P.C. 1.15; La. R.P.C. 1.15(d); Me. C.P.R. 3.6(e)(4); Md. Bus. Occ. & Prof. Code Ann. § 10-303; Mass. R.P.C. 1.15; Mich. R.P.C. 1.15(d); Minn. R.P.C. 1.15(d); Miss. R.P.C. 1.15(d); Mo. R.P.C. 4-1.15; Mont. R.P.C. 1.18(b); Neb. Sup.

sory powers to regulate the legal profession, for the purpose of helping meet the enormous need for legal assistance that confronts low-income individuals, families and communities across the Nation. Endorsed by the Conference of Chief Justices and the American Bar Association, IOLTA programs are an essential part of our civil justice system and strive to achieve "Equal Justice Under Law," the laudable objective carved in stone over the entrance to this Court.

A. Vulnerable People Across The Nation Rely On IOLTA Programs.

Nearly 33 million people in this country live in households with a family income below the poverty level.[6] Numerous States, professional associations, and academics have conducted surveys within the last decade to assess the number and kind of legal needs that exist among low to moderate income communities, the extent to which these legal needs remain without redress, and the manner in which these needs are met. These studies have consistently shown that between 70 and 90 percent of this population cannot obtain legal services to resolve the most pressing legal problems, even when services provided through existing public and private funding

---

Ct. R. Trust Accts.; Nev. Sup. Ct. R. 217; *In re New Hampshire Bar Ass'n*, 453 A.2d 1258 (N.H. 1982); N.J. R. Gen. App. 1:28A-2; N.M. R.P.C. 16-115(D); N.Y. Jud. Law § 497; N.C. Admin. Code tit. 27, rr. 1D.1301-.1316; N.D. R.P.C. 1.15(d)(1); Ohio Rev. Code Ann. § 4705.09(A)(1); Okla. R.P.C. 1.15(d); Ore. C.P.R. DR 9-101(D)(2); Pa. R.P.C. 1.15(d); R.I. R.P.C. 1.15(d); S.C. App. Ct. R. 412; S.D. R.P.C. 1.15(d)(4); Tenn. C.P.R. DR 9-102(C)(2); Tex. R.P.C. 1.14; *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); Va. Sup. Ct. 6:2-1.15; Wash. R.P.C. 1.14; W. Va. R.P.C. 1.15(d); Wis. Sup. Ct. R. 20:1.15; Wyo. R.P.C. 1.15. All state statutory authority current as available on Westlaw.

[6] U.S. Census Bureau, *Poverty in the United States: 2001*, *available at* http://www.census.gov/hhes/poverty/poverty01.

sources (including IOLTA) are accounted for.[7] The most recent studies tend to place the level of unmet need at the high end of this spectrum, in contrast to earlier studies that were performed or based upon data collected before a 30 percent cut in funding that Congress imposed on the Legal Services Corporation ("LSC") in 1996, and before lower interest rates and higher administrative fees decreased IOLTA funds in the last several years.

One recent study evaluated legal needs of 100,000 persons living at or below the poverty level in the District of Columbia.[8] Building upon the methodology and analysis em-

---

[7] *See, e.g.*, Lynn E. Cunningham, *Legal Needs for the Low Income Population In Washington D.C.*, 5 U.D.C. L. Rev. 21, 58 (2000) (ninety percent of legal needs are not being met for households living in low income households); Richard C. Baldwin, *Needs and Deeds*, Oregon State Bar Bulletin 11 (Dec. 2000), *available at* www.osbar.org/2practice/bulletin/00dec/feature.htm (last visited October 16, 2002) ("low income Oregonians were able to obtain the services of an attorney only 18.2 percent of the time"); Mark D. Killian, *Study: Legal Needs Going Unmet*, Florida Bar News (Mar. 15, 1995), *available at* http://www.afn.org/~afn54735/legalneeds1.html (last visited Oct. 16, 2002) (in 1993 to early 1994, 70 percent of low and moderate income households in Florida had no access to the legal system); American Bar Association, *Findings of the Comprehensive Legal Needs Study Conducted by the Institute for Survey Research at Temple University for the Consortium on Legal Services and the Public* (1994) (approximately 80% of legal needs of low-income population unmet); Questions and Answers About the Dallas Volunteer Attorney Program, *at* www.lsnt.org/nav/volist.asp (last visited Oct. 16, 2002) (in 1991, almost 70% of the legal needs of poor Texans go unmet every year); United Way/Community Service Council of Central Indiana, *Legal Needs Study of the Poor in Indiana* (Feb. 1992) (reporting that as of 1988, less than 10% of legal needs of the poor were being met); The Spangenberg Group, Inc., *An Assessment of the Unmet Civil Legal Needs of Ohio's Poor* ("The Spangenberg Report") (Sept. 1991), *available at* www.olaf.org/aboutolaf/ourpublications/spangenburg (last visited Oct. 16, 2002) (between July 1989 and July 1990, 83% of legal problems among low-income households in Ohio went without legal help).

[8] Cunningham, *supra*, 5 U.D.C. L. Rev. at 24.

ployed in studies conducted by the ABA in 1994 and various state commissions, the D.C. study identified 206,622 legal needs in the District of Columbia for which a low-income person stood "a reasonable chance" of obtaining an improved position with professional legal assistance.[9] After documenting that only about 21,000 of those needs were, in fact, addressed by all provider resources, the study concluded that 90 percent of legal needs of low-income persons in the District of Columbia were left unmet.[10]

Many of the studies conducted in the last ten years also identify key areas in which the poor most need legal services. Access to safe, affordable housing and health care, disputes over utility service, domestic violence, the need to obtain divorce, custody, and child support, juvenile justice issues, consumer problems, and difficulty interacting with government agencies all rank among self-reported legal issues facing low-income communities in great numbers.[11] The problem of access to justice is particularly acute for rural, elderly, and disabled populations that lack the ability to travel to remote legal services centers. Although many low-income persons do not seek legal assistance for these legitimate problems due to a perception that legal services are unaffordable, or to a lack of knowledge about how to find an available attorney,[12] studies show that civil legal aid lawyers often lack

---

[9] *Id.* at 57

[10] *Id.* at 59.

[11] *See, e.g., Legal Needs Study of the Poor in Indiana, supra,* at 15-20; Cunningham, *supra,* 5 U.D.C. L. Rev. at 26-51.

[12] *See Legal Needs Study of the Poor In Indiana, supra,* at 13 ("about 14% of those interviewed indicated they were aware of or have ever used . . . an organization that provides free legal assistance"); ABA National Conference on Access to Justice in the 1990s, *Civil Justice: An Agenda For The 1990s* (June 9-11, 1989), *available at* http://www.abanet.org/legalservices/downloads/sclaid/access.conf.pdf (last visited Oct. 16, 2002); The Spangenberg Report at 5 (fifteen percent of those surveyed did not know whether free services were available for their legal problems).

sufficient resources to provide needed legal assistance to those who do seek help.[13]

B. The Substantial Contribution Of IOLTA.

1. IOLTA Programs Rank Among The Largest Sources Of Funding Of Legal Services For The Poor.

According to a report by the ABA's Commission on IOLTA, the total income raised in 2001 by IOLTA programs nationwide (excluding North Dakota, South Dakota and Utah, for which information was unavailable) was $205,024,935.[14] A sampling of reports from individual

---

[13] *See, e.g.,* Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* 13 (Apr. 30, 2000), *available at* http://www.lsc.gov/pressr/EXSUM.pdf. (last visited Oct. 16, 2002) ("A survey of selected programs in the spring of 1993, when LSC funding was substantially higher than it is today, revealed that nearly half of all people who applied for [legal] assistance from local programs were turned away because of a lack of program resources"); Baldwin, *supra* (in Oregon, "[t]wo out of three clients eligible for services under federal poverty guidelines were turned away by legal services offices due to scarce resources" and "two out of three clients served by those offices obtained only minimal service (*e.g.* brief advice or a brochure) due to scarce resources"); The Spangenberg Report at 6 (in 1989, prior to additional federal funding reductions that occurred in the 1990s, a majority of LSC funded staff programs had to limit intake to only emergencies).

[14] American Bar Association Commission of Interest on Lawyers' Trust Accounts, *IOLTA Handbook* 98, 208 (Jan. 1995, updated July 2002). It is important to understand that the total income earned by IOLTA programs in 2001 reflects more than just the $162,243,664 of interest earned on IOLTA accounts—it also tabulates investment income that is returned on interest income, as well as court filing fees administered by IOLTA programs. *Id.* at 98. IOLTA program administrators thus have the ability to retain reserves and manage interest proceeds in a manner that maximizes returns and provides additional value to the ultimate beneficiaries of services provided by IOLTA grantees.

States indicates grant levels in a cross-section of rural, urban, small and large population states:

Year Reporting	State	Total IOLTA Grants Awarded
FY 2002	Alaska	$344,000[15]
FY 2002	Arizona	$948,500[16]
FY 2001	Colorado	$1,056,881[17]
2001	Florida	$10,500,000[18]
2002	Idaho	$230,000[19]
2001	Indiana	$300,000[20]
FY 2002	Kentucky	$700,000[21]
FY 2003	Massachusetts	$7,816,115[22]
2001	Michigan	$1,478,570[23]
FY 2003	Minnesota	$1,749,600[24]

[15] Alaska Bar Association website, www.alaskabar.org/ index.cfm?id=5268 (last visited Oct. 16, 2002).

[16] Arizona Bar Foundation website, www.azbf.org/AZFLSE/legalservices/ioltagrants.cfm (last visited Oct. 16, 2002).

[17] Colorado Lawyer Trust Account Foundation website, www.coltaf.org/current_grantees.htm (last visited Oct. 16, 2002).

[18] The Florida Bar Foundation, *An Overview of the IOTA Legal Assistance for the Poor Program 2001*, Lodging App. 196.

[19] The Idaho Law Foundation website, www2.state.id.us/isb/pub_info/iolta_grants.htm (last visited October 16, 2002).

[20] Indiana Bar Foundation, *Annual Report 2001*, *available at* www.inbar.org/ content/news/article.asp?art=64 (last visited Oct. 16, 2002).

[21] Kentucky Bar Association website, www.kybar.org/KBF_IOLTA/iolta_grant_history.htm (last visited Oct. 16, 2002).

[22] Massachusetts Legal Assistance Corp. Response, Lodging App. 468.

[23] Report of the Michigan State Bar Foundation (2002), Lodging App. 284.

FY 2002	New Hampshire	$1,286,410[25]
2000	New York	$10,780,000[26]
2002	Texas	$4,166,667[27]

The relative impact of IOLTA on access to justice can be measured by comparing IOLTA funding to the funding awarded by the LSC—the largest federal program offering direct financial assistance for legal services to the poor. In 2001, IOLTA programs provided approximately $146,882,369 toward legal services for the poor,[28] about one-half of the funding appropriated for LSC grants ($310,000,000) in that period.[29]

2. IOLTA Funds Help Thousands of Low-Income Individuals And Families.

This brief presents information obtained by NLADA in a survey of members initiated on July 22, 2002.[30] The re-

[24] Report of the Minnesota State Bar Association, Lodging App. 120.

[25] New Hampshire Bar Association website, www.nhbar.org/ site-map.asp (last visited Oct. 16, 2002).

[26] The IOLA Fund of the State of New York website, www.iola.org (last visited Oct. 16, 2002).

[27] Texas Equal Access To Justice Foundation website, www.txiolta.org/grantees.html (last visited Oct. 16, 2002).

[28] *IOLTA Handbook*, *supra*, at 208.

[29] *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000). The LSC reported that, in 1999, IOLTA was the third largest donor of funds to recipients of LSC grants, behind the LSC and state/local governments, providing 11.3% of total funding for LSC grantees. LSC, *Serving the Civil Legal Needs of Low-Income Americans*, *supra*. Such percentage does not reflect the amount of IOLTA funds granted to legal services providers that do not also receive LSC funds.

[30] The survey request is reproduced in full at Appendix A to this brief. In sum, NLADA asked for information regarding: (1) the amount of IOLTA funding each member received; (2) the number of employees this amount supported; (3) the number of cases/matters it attributed to

sponses illustrate the central importance of IOLTA funds, which enabled survey respondents to provide legal services well in excess of 176,297 cases annually.[31]

Some IOLTA funds are used for general purposes, such as training for staff and volunteer personnel, technical assistance, community and public education, group advocacy, and providing self-help information by such means as seminars, clinics, and brochures. Other IOLTA funds support direct legal representation of individuals in matters essential to their personal, physical and financial well-being, involving issues in many legal fields. The overwhelming majority of matters center on family law, protection from domestic violence, housing issues, public benefits and income maintenance, and consumer protection. Other areas include abuse of the elderly, juvenile proceedings, protection of family farms, and rights of the institutionalized or disabled. We provide below a few illustrative examples of cases and successful outcomes made possible by IOLTA funding.

Helping Vulnerable People Cope with Medical Crises. Legal aid providers rely on IOLTA funding to obtain critical medical care or sustaining income during a medical crisis. In one example, a nurse's aide in her mid-30s with a three-year-old son was diagnosed with advanced breast cancer. For one year, debilitating treatments prevented her from working and

---

IOLTA funding; (4) a breakdown of these cases/matters by types; (5) delivery initiatives that contribute to the administration of justice/access issues supported by IOLTA funding in its program/state; (6) a short narrative of how IOLTA contributes to the provision of legal services to poor people in its program/state; (7) anecdotal examples describing particular legal services that were made possible by IOLTA funding.

[31] Eighty-five programs in 33 States responded to the survey, reporting receipt of a combined total of $53,988,038 in annual IOLTA grants—approximately 37% of the total grants awarded by IOLTA programs nationwide. A list of the responding organizations is attached at Appendix B. Copies of the full responses have been lodged with the Clerk and sent to counsel for the parties.

dissipated her savings. When she was wrongfully denied SSI benefits, the Community Legal Aid Society of Delaware amassed convincing evidence of her disability and persuaded an administrative law judge to award her desperately needed benefits on the spot. Lodging App. 458-59.

Likewise, the Tennessee Justice Center ("TJC") helped save a 13-year-old boy who was dying of respiratory complications. His family became lost in administrative red tape when, although all medical personnel agreed that his condition required emergency surgery, the managed care company refused to pay. The TJC persuaded state officials to direct payment for the procedure, and the boy is successfully recovering. Lodging App. 66.

Helping Tenants Threatened with Unjustified Eviction. The New Haven Legal Assistance Center prevented the eviction of a single mother with multiple sclerosis and her four children from an apartment, when the landlord instituted proceedings to evict her for non-payment of rent, despite proof of payment. Lodging App. at 61. Likewise, the Community Legal Aid Society of Delaware stopped the victimization of, and obtained alternative housing for, another woman with children, when her refusal of her landlord's unwanted demand for sexual favors prompted him to turn off her utilities in the middle of winter. Lodging App. 457-58.

Supporting Family Farms and Ranches. IOLTA funds programs that assist rural farmers and ranchers with the myriad legal and financial issues that plague small landowners coping with drought, water restrictions, natural disasters, and the everyday hardships of small farming operations. For instance, Nebraska Legal Services operates a Farm Mediation Service, which offers farm borrowers and lenders the guidance of highly skilled impartial mediators to resolve disputes as an effective, confidential alternative to bankruptcy and foreclosure. Lodging App. 533-34.

Protecting Children and Families. A working mother suffered cruel physical and emotional abuse at the hands of

her unemployed husband. As a result, her child refused to speak. The Jacksonville Area Legal Aid Clinic successfully challenged the father's court-ordered custodial status (which he had obtained by threatening violence), secured an injunction requiring supervision of the father's visits, and is assisting the mother in divorce proceedings. Removed from the violent environment, the child now speaks articulately.

Legal aid programs are instrumental in enforcing court orders of child support against parents who seek to avoid such legal obligations, or obtaining such support in legally complicated situations. The Georgia Law Center for the Homeless (GLCH) established the paternity of a deceased father who had supported his child while he was alive, and obtained Social Security survivor benefits for the child. The child's mother could not have accomplished this alone: the Law Center convinced a state agency to preserve the only DNA evidence available to establish paternity. Lodging App. 58.

Protecting the Elderly. Legal aid programs funded by IOLTA protect elderly persons in a variety of ways. Around the country, they bring consumer protection actions against fraudulent salespersons who convince elderly homeowners with a great deal of equity in their homes to purchase overpriced and unnecessary repairs and to sign usurious or otherwise disadvantageous refinancing agreements, enabling the salesperson to abscond with the remaining equity when foreclosure becomes necessary. Lodging App. 459-60, 364.

Safeguarding the physical well-being of the elderly, the Atlanta Legal Aid Society intervened to protect a woman in a licensed personal care home who was injured, malnourished and dehydrated due to neglect. Consequently, the woman obtained medical care and placement in an appropriate nursing facility. The proven neglect by the licensed home provider caused the loss of its permit to operate. Lodging App. 115.

Helping Individuals Contend with Bureaucratic Error. Sometimes IOLTA-funded lawyers resolve bureaucratic errors in government or large companies that nonlawyers cannot themselves untangle. For two hardworking, low-income clients, Legal Services of Greater Miami obtained a $7,280 tax refund, which the IRS had wrongfully refused to provide. Lodging App. 224-25. A pro bono volunteer recruited by Legal Services of Eastern Michigan spent two years clearing the bad credit record of a woman whose record erroneously reflected that she was in default on thousands of dollars of student loans that she had never applied for or received. Lodging App. 315. New Hampshire Legal Assistance (NHLA) obtained unemployment compensation for a working mother simultaneously employed full-time in a factory and part-time at Wal-Mart. After poor health forced her to relinquish her part-time job, she lost the other when the factory closed. NHLA persuaded a state agency on appeal that voluntary termination from a part-time job does not disqualify a claimant from unemployment benefits in New Hampshire when the claimant is subsequently laid off from a full-time job. Lodging App. 147.

These legal services programs are not just helping individuals—they are saving society the much higher costs it would incur were legal services not provided. By facilitating custody orders that place orphaned or neglected children with grandparents, IOLTA programs save the State from the short-term costs of supporting a child in the foster care program, and the longer-term costs of addressing the emotional and other difficulties that often arise when a child is displaced from his family environment. Lodging App. 207. IOLTA-funded advocacy often provides Medicaid patients with less-expensive care or benefits that enable the patients' caretakers to continue working and contribute to a productive society. *See, e.g.*, Lodging App. 502 (obtaining release of 8-year-old boy from residential treatment facility, allowing him to live at home with appropriate community based health services); Lodging App. 460-62 (single mother working part-time and

attending nursing school able to keep working and earning degree because daughter with cerebral palsy was provided with nursing services through Medicaid).

The foregoing provides a glimpse into the many success stories contained in the survey responses lodged with the Clerk. In example after example, IOLTA funding serves the public good by helping people who are in desperate need, and whose cases would be hopeless without IOLTA programs to provide access to justice. With this impressive showing of IOLTA's service for the public good, it is preposterous for Petitioners to assert (Br. 30) that "no combination of government interests, or other surrounding facts and circumstances can possibly provide a basis for sustaining" IOLTA—an assertion that is also flatly inconsistent with Petitioner's acknowledgment (Br. 21) that IOLTA programs support a "laudable public goal—the funding of legal services for those unable to afford them."

3. IOLTA Subsidizes Delivery Models Uniquely Suited To Serving The Poor.

In addition to delivering traditional litigation and transactional legal services, legal services providers also utilize IOLTA funds to develop alternative models for meeting legal needs tailored to the population they serve. For instance, IOLTA funds enable remote or incapacitated populations to obtain legal help through telephone hotlines or satellite intake centers in rural areas. IOLTA grantees offer public education efforts at such venues as senior citizen centers, domestic violence shelters, mental health facilities, homeless shelters, AIDS clinics, substance abuse clinics, and refugee centers.

IOLTA funds are also used, for example, to teach the poor to help themselves more effectively. IOLTA funds support clinics designed to assist low-income persons in performing basic legal tasks, such as filling out administrative forms, obtaining no-contest divorces, or filing for bankruptcy, on their own. Some providers use IOLTA funds to implement new technologies for outreach and pro se assistance—for example, by placing forms and informational guides on a website.

IOLTA also helps leverage the resources of the private bar. Legal services providers can effectively meet some of the unmet needs of the poor by recruiting private attorneys willing and eager to contribute pro bono service to worthy causes. For instance, the Florida Bar Foundation, which operates Florida's IOLTA program, reported that it was able to leverage $14.2 million in donated services from volunteer lawyers. Lodging App. 198. Once IOLTA-funded public service providers assist pro bono attorneys in identifying particular individuals needing services, IOLTA makes pro bono assistance more effective by funding training sessions in specialized area of poverty law for attorney volunteers who may be accustomed to dealing with the very different problems of businesses and wealthy individuals. Without the funds to cover administrative costs of this outreach and training, much of the energy and enthusiasm generated by the private bar for pro bono work would be wasted due to the lack of an efficient clearinghouse to refer those who need services to those who are willing to provide them.

IOLTA also supports alternative dispute resolution mechanisms to be used to alleviate some of the burden on courts and agencies. For instance, some NLADA members have established mediation programs, in which low income persons may mediate custody and other contentious disputes with the goal of minimizing or eliminating the need for agency or court intervention. Lodging App. 60, 138.

4. The Particular Importance Of IOLTA As Compared To Other Funding Sources.

Every recipient of IOLTA funds described that support as critical to operations that would otherwise have to be eliminated or severely curtailed. *See, e.g.*, Lodging App. 105. Especially for small and rural providers, which are largely ignored by foundations and large corporate donors,

Lodging App. 512-14, IOLTA constitutes the "backbone" of legal assistance operations. Lodging App. 176.

Two vital characteristics of IOLTA make the programs especially important to service providers. *First*, IOLTA funds provide a platform to leverage other funding sources. Service providers can pursue matching funds from various charitable foundations and corporate donors, or use IOLTA to establish the administrative structure to build and sustain specialized projects that capture the interest of private donors. The imprimatur placed upon a service provider whose grant application has been screened and accepted by an IOLTA grant committee gives comfort to other charities with funds to allocate that the grantee is serving a needy community well.

Second, IOLTA funds support essential services that cannot be funded through other public or private grants, because grants are often earmarked for certain uses only. *See* Lodging App. 44. Whereas corporate grants sometimes do not permit *any* application of funds to "overhead" or "administrative costs," IOLTA funds pay lawyers and staff required to supply basic legal services and programs. They can be allocated to the highest and best use within a particular community to fill necessary gaps in coverage for persons in need. As one NLADA member put it, IOLTA "allows us to support the 'bread and butter work' like evictions or regular divorces, not supported by funds targeted for whatever the new cause of the day is." Lodging App. 114.

C. Without IOLTA, Alternative Sources Of Funding Will Be Inadequate To Meet The Legal Needs Of The Elderly And Poor.

IOLTA funding cannot realistically be replaced by other sources. Private donations to legal aid organizations are especially vulnerable to economic downturns. Despite increases in the number of people with incomes under the poverty line, LSC funding has remained essentially static for

several years and substantial increases are not anticipated in the near future.

1. Client Needs Cannot Be Met By Private Donations Alone.

Studies of Americans' charitable giving patterns demonstrate that relying on private donations as a source of legal services funding is an inherently unsustainable proposition. Organizations that provide legal services to the poor and elderly are the most susceptible to cycles in the economy, as well as to events of national and global scale that "crowd out" charitable giving to organizations such as legal aid providers whose mission is not directly related to those events. In Connecticut, for example, IOLTA funds comprised more than half the funding for legal aid organizations across the state in 2001, and "[i]t is clear that the needs of the program . . . cannot be raised by voluntary contributions, nor can volunteerism fill the gap."[32]

Like many other social services agencies, legal services groups suffer when national and world events prompt Americans to rethink their charitable giving. Historically, national giving patterns are "strongly driven by changes in the economy"; while national giving typically rises by 4 percent in non-recessionary years, that rate historically falls at an inflation-adjusted rate of 1 percent in recessionary years.[33] And when charitable giving does wane, it has a much greater impact on groups like legal services organizations; while well-established recipients such as large universities and nationally recognized charities tend not to be affected greatly by economic fluctuations, small, "grass-roots organizations that

---

[32] *Legal Services Needs Immediate Support*, Conn. L. Trib., June 10, 2002, at 23.

[33] The Center on Philanthropy at Indiana University, *Philanthropic Giving Index* 6 (Summer 2002).

strive to help the poor"[34] and "that need the cash the most"[35] are disproportionately affected. Moreover, service-oriented charitable organizations, such as legal aid groups, experience higher-than-average price elasticity than do charities as a whole, meaning that those groups are more greatly affected by changes in their donors' respective financial situations.[36]

Similar fluctuations in charitable giving historically occur when "newsworthy" events of national and global scale prompt Americans to give to a particular cause in large numbers. In the aftermath of the September 11 attacks, for instance, Americans' generous giving to large relief organizations such as the American Red Cross and the September 11 Fund had the "unpleasant side effect" of reducing contributions to smaller relief organizations "noticeably."[37] This phenomenon has been felt directly by legal services organizations that receive most of their private donations from law firms. Following September 11, legal services organizations in New York and Washington, D.C. have described a "diversion problem": funds spent by law firms to help victims of the tragedies have in some cases been made in lieu of, rather than in addition to, their regular donations to legal aid causes.[38]

Given the inherent volatility of private contributions to legal services organizations, it is not likely that those organi-

---

[34] Aline Sullivan, *The Heart Is Willing, But the Economy Isn't*, Barron's, Dec. 17, 2001, at 23.

[35] Lisa Gubernick, *Giving: The Big Charity Chill*, Wall St. J., Dec. 1, 2000, at W1.

[36] Robert McClelland & Mary F. Kokoski, *Econometric Issues in the Analysis of Charitable Giving*, 22 Pub. Fin. Q. 498, 513 (1994).

[37] MacKenzie Carpenter, *Some Charities See Drop in Giving This Year*, Pitt. Post-Gazette, Dec. 24, 2001, at A1.

[38] Andrew Longstreth, *Charity: Double Dipping*, Am. Lawyer, Dec. 2001, at 25.

zations would be able to make up the shortfall from other sources of funding if IOLTA programs were to be terminated. Important supplements to IOLTA other than private donations, such as raising court costs to litigants,[39] using funds escheated to the state under the *cy pres* doctrine,[40] or instituting statewide mandatory pro bono programs,[41] have not been universally implemented and, even if they were, could not generate nearly enough funding to meet the needs that are presently met by IOLTA.

2. Legal Services Without IOLTA: The Indiana Example.

For real-world evidence underscoring these concerns, one need only look to the recent history of legal services in Indiana, which in 1998 became the 50th State to adopt a statewide IOLTA program. Under the pre-IOLTA regime, legal aid to the poor was, by any reasonable measure, woefully inadequate. A survey conducted in 1992 by the United Way/Community Service Council of Central Indiana found that less than 10 percent of the potential legal problems of Indiana's poor were being met,[42] and that "a critical funding shortage severely restricts the availability of civil legal assistance to Indiana's poorest citizens,"[43] particularly those living in the rural half of the State, where legal aid organiza-

---

[39] William C. Lhotka, *Raising Court Fees Will Help Aid for Poor, Advocates Say*, St. Louis Post-Dispatch, Apr. 8, 2002, at B1.

[40] *See* Brad Seligman & Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services*, *available at* http://www.impactfund.org/CyPres2000FED.html (last visited Oct. 16, 2002).

[41] George Schatzki, *The Survival of Legal Services for the Poor in Connecticut*, 70 Conn. B.J. 313, 322 (1996).

[42] *Legal Needs Study of the Poor in Indiana*, *supra*, at 73.

[43] *Id.* at 81.

tions were practically nonexistent.[44] The report noted that federal funding accounted for more than 75 percent of all legal services funding in the state, and that "[p]rivate dollars, along with state and local government spending, were not able to make up the deficit."[45] Moreover, for those fortunate enough to receive any legal assistance, the quality of service rendered was often insufficient; about 60 percent of all LSC cases received only limited forms of representation, such as referrals, counsel and advice—at a time when LSC funding was much greater than it is today.[46] The report's first conclusion was that, in order to improve legal services in Indiana, "a comprehensive IOLTA program" must be created and implemented.[47]

Indiana's IOLTA program did not begin making grants to legal services organizations until March 2001.[48] The state program used the funds initially to provide start-up and administrative funds for pro bono programs involving lawyers from the local bar associations.[49] Based exclusively on IOLTA funding of over $1 million, the Indiana Pro Bono Commission was created to help address the legal services needs of Indiana citizens.[50] As a result, that Commission noted that "the number of people working towards developing pro bono resources [in Indiana] [has] increased exponentially"—a trend that, in the Commission's view, "should bring a tangible difference in the lives of many of the under-

[44] *Id.* at xvii.

[45] *Id.* at xvi.

[46] *Id.* at xvii.

[47] *Id.* at xix.

[48] *Grant To Fund Free Legal Services*, South Bend Trib., Mar. 14, 2001, at D2.

[49] *Id.*

[50] *See* About the Pro Bono Commission, *available at* http://www.in.gov/judiciary/probono/about.html (last visited Oct. 16, 2002).

served population in Indiana."[51] With IOLTA, the Indiana Bar Foundation has observed that "[t]he outlook for the future is optimistic."[52] If IOLTA programs in Indiana and elsewhere were to be abolished, the prognosis for legal services would undoubtedly darken significantly.

D. The Dangers Of Leaving Substantial Populations Without Access To Justice.

Leaving a substantial segment of society without proper access to the justice system would have an enormous impact on the individuals whose needs are not addressed. A lack of legal assistance can leave poor people homeless, victims of unscrupulous vendors, without necessary medical care, subject to domestic violence, facing the loss of the family farm, or helpless in the face of otherwise intractable legal problems. In addition, it produces deleterious effects beyond the mere fact that persons who are wronged receive no redress. *First*, persons who cannot afford to hire a competent attorney to address a legal problem may engage in inadequate self-help or consult incompetent non-lawyers and exacerbate their problems. Either of these options imposes significant costs upon administrative agencies and court staffs in responding to them. By providing access to legal professionals who can advise clients when claims lack merit and, for meritorious claims, steer the client to the appropriate avenue for redress, adequately funded legal services programs have the potential to facilitate the administration of justice.

Second, legal need studies report that persons who obtain the assistance of a legal professional for a particular problem

[51] *See* Indiana Pro Bono Commission, *2000 Annual Pro Bono Report and Plan*, *available at* http://www.courts.state.ny.us/pbconvocation/indianapbcommrpt.pdf (last visited Oct. 16, 2002).

[52] *See* Indiana Bar Foundation, *2001 Annual Report*, *available at* http://www.state.in.us/judiciary/probono/attorneys/reports (last visited Oct. 16, 2002).

are more likely to be satisfied with the response to that need—even if the client has not obtained a favorable outcome. Baldwin, *Needs and Deeds* at 2. Those left without representation form negative opinions about the legal system generally. *Id.* Naturally, persons who remain at the fringes of our legal system or who harbor negative opinions about the legal system generally will be far less likely to know, respect and believe in the law and those who enforce it.

II. THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT PROVIDES NO REMEDY TO PETITIONERS.

Although we do not undertake to present the full legal analysis that has been supplied by Respondents and several amici, we do point out a few features of the Washington program and this case that make it inescapably clear, under this Court's decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), that Washington's IOLTA program takes no property of the Petitioners for which any compensation is due.

First, Petitioners' attempt to avoid application of *Penn Central* altogether should be rejected. Petitioners' disingenuous statements that IOLTA "involves no regulatory purpose of any sort" (Br. 15) and "is not about regulation of private conduct or exercise of the State's police powers . . ." (*id.* at 22-23) belie reality and their own admissions. Petitioners correctly framed the question presented in this case as one involving a "regulatory scheme for funding state legal services." *See* Pet. i. IOLTA programs lie within the core of regulatory authority—by imposing conditions and limitations on the everyday conduct of persons licensed by the government to practice in the legal and banking professions. It cannot be questioned that IOLTA programs "adjust[] the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124. The enormous degree to which the IOLTA programs succeed in promoting the common good, when compared to the intangible and non-

quantifiable alleged interference with Petitioners' property, necessarily dictates the conclusion that no compensable taking has occurred here.

Second, Petitioners have overlooked a critical aspect of the Washington program that refutes their contention that state action deprived them of property. Although Washington's IOLTA program is mandatory for lawyers (and other licensed professionals), the same cannot be said for clients. In addition to the obvious fact that a client's decision to entrust funds to a lawyer or real estate professional for the purpose of obtaining legal services or effecting a legal transaction is a completely voluntary decision with no state involvement or coercion, any client may also withdraw funds placed with an attorney at any time upon demand. *See* Wash. R.P.C. 1.14(b)(4) ("A lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds . . . in the possession of the lawyer which the client is entitled to receive.") Moreover, a client can freely choose *not* to subject his or her funds to deposit in an IOLTA account, simply by supplying funds to a lawyer in a sufficient amount or for a sufficient time as to be capable of earning net interest, which in Washington would then require the establishment of an interest bearing account with proceeds payable to the client. *See* Wash. R.P.C. 1.14(c)(2). Thus, Petitioners simply have no credible argument that Washington has in any way deprived them of the power to earn interest or to exclude others from earning interest on principal owned by them.

Third, although Petitioners attempt to characterize IOLTA programs as takings that rob from Peter to pay Paul, Peter is nowhere to be found in this litigation. Prior to the institution of IOLTA programs, banking institutions retained all benefits associated with the income-generating power of nominal or short term deposits. If IOLTA were held to be invalid, the millions upon millions of dollars generated by IOLTA programs would not become available for Petitioners. Rather, lawyers would place these nominal or short term funds, as they had in the past, into trust accounts payable on

demand as required by rules of professional conduct, *see, e.g.*, Wash. R.P.C. 1.14(a) & (c), which by virtue of bank and administrative costs could not earn interest for the client. Thus, banks are the *only* parties who might be in a position to complain about having, as a result of IOLTA, lost the opportunity to accrue wealth that had previously existed. Petitioners simply possessed no "investment backed expectations," as anticipated by *Penn Central*, that the State of Washington has taken, or could take, away.

Petitioner Washington Legal Foundation has, in fundraising letters to finance this litigation, made clear that this case is not at all about property it believes has been taken away from it or its members. Its solicitation for funds makes Petitioners' real purpose plain—to "deal a death blow to the single most important source of income for radical legal groups all across the country." *See* Fundraising letter from Washington Legal Foundation dated September 4, 2002 (App. 9a). As this brief and the materials lodged in support herewith make plain, this is a gross mischaracterization of the nature of IOLTA-funded legal services programs. These programs provide essential legal services to American citizens who cannot afford to pay for them and who, without such services, live in desperate circumstances. What Petitioners oppose is not the disruption of their own investment-backed expectations, but rather IOLTA's use of interest "to support programs [they] oppose," but which duly elected and appointed state legislatures and courts throughout the country strongly support. Petitioners' effort to distort the Just Compensation Clause merely to suit their political agenda must not be countenanced.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

JOHN H. PICKERING
SETH P. WAXMAN
Counsel of Record
STEPHEN W. PRESTON
JODY MANIER KRIS
JONATHAN H. SIEGELBAUM
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae
AARP, LCE, NLADA and the Brennan Center for Justice

Of Counsel
STUART R. COHEN
ROCHELLE BOBROFF
AARP FOUNDATION LITIGATION

–and–

MICHAEL SCHUSTER
AARP
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

Counsel for Amicus Curiae AARP

DONALD M. SAUNDERS
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-0620

–and–

LINDA E. PERLE
CENTER FOR LAW AND SOCIAL POLICY
1015 15th Street, NW
Suite 400
Washington, D.C. 20005
(202) 906-8002
Counsel for Amicus Curiae NLADA

BURT NEUBORNE
DAVID S. UDELL
LAURA K. ABEL
CRAIG SIEGEL
BRENNAN CENTER FOR JUSTICE AT NYU LAW SCHOOL
161 Avenue of the Americas, 12th Floor
New York, N.Y. 10013
(212) 998-6720
Counsel for Amicus Curiae Brennan Center for Justice

OCTOBER 2002

APPENDIX A

[Logo]
National Legal Aid Defenders Association
1625 K Street, N.W., Suite 800
Washington, D.C. 20006-1604
T: 202.452.0620
F: 202.872.1031
www.nlada.org

MEMORANDUM

To: Recipients of IOLTA Funds Providing Legal Services to the Poor and Access to Justice Coordinators

From: Don Saunders, Director of Civil Legal Services, NLADA

Re: Important Information Request for *Amicus Curiae* Brief Before the United States Supreme Court

Date: July 22, 2002

NLADA is committed to supporting in every possible way the advocacy effort before the Supreme Court this fall in the IOLTA litigation from the Ninth Circuit, *Washington Legal Foundation v. Legal Foundation of Washington*. We are working closely with counsel in the case and are preparing an *amicus* brief to support and amplify upon important issues in the Legal Foundation of Washington's arguments to the Court. Our brief will focus on the importance of IOLTA funding to the administration of justice, particularly stressing access issues as they relate to the program provider and client community.

To make this point, we need to gather as much information from the provider community as possible — information that will allow us to paint a compelling picture of the importance of this funding source to the administration of justice in the 50 states and territories. **WE NEED YOUR HELP** in gathering this information, as you are the ones who make ac-

cess to justice a reality for the people you serve. The more information we can document, the more effective presentation we can make.

Therefore, we ask that you make a serious commitment in the next several weeks to providing us with information relating to your program's use of IOLTA funds in providing representation to poor people. To present a comprehensive look at the importance of this funding source, we would like as much information as we can get from the program and state levels.

Specifically, we need for you to provide information (where relevant) at either the program or state level related to the following issues:

1. Amount of IOLTA funding you receive;
2. Number of employees this funding supports;
3. Number of cases/matters your program attributes to IOLTA funding (if you don't account separately, I suggest you apply a percentage reflecting your IOLTA percentage of funding to your overall case statistics);
4. Breakdown of these cases/matters by type;
5. Delivery initiatives that contribute to the administration of justice/access issues supported by IOLTA funding in your program/state (e.g. pro se efforts, hotlines, technological innovation);
6. A short narrative of how IOLTA contributes to the provision of legal services to poor people in your program/state;
7. Strong anecdotal examples that bring home what this resource means in human terms related to critical legal needs (e.g. a compelling family violence case; saving a family farm; helping a disabled child, representation of the elderly; etc.); and

8. Other information you would like to add

Unfortunately, the Court's briefing schedule does not provide us with a luxury of time to produce our work product. The briefs are due from the Legal Foundation of Washington and *amici* on September 23. Therefore, we need your responses by **AUGUST 7**. We don't need reams of information from each respondent, so I hope this short timeframe does not deter your response. The more comprehensive the factual data we can gather, the stronger the arguments we can present.

If possible, please provide your response electronically to:

d.saunders@nlada.org.

The Legal Foundation of Washington, the ABA and the National Association of IOLTA Programs and their outstanding team of pro bono counsel from across the nation are doing a tremendous job of preparing the case for the Supreme Court. We are working closely with them to ensure that our support brief is consonant with the theories they are espousing as primary litigants. Please help us do our part in supporting the litigation.

Thank you. If you have any questions, either e-mail me or give me a call at 202-452-0620 ext. 224.

cc: IOLTA Program Directors

APPENDIX B

List of Survey Respondents

Alabama
- Legal Services of Metro Birmingham, Inc.

Arizona
- DNA-People's Legal Services

California
- Child Care Law Center
- California Center for Law and the Deaf
- Public Law Center - Orange County
- Grey Law of Ventura County, Inc.
- Voluntary Legal Services Program of Northern California, Inc.
- Consumer Center for Health, Education and Advocacy
- Western Law Center for Disability Rights
- Homeless Action Center
- Legal Services for Prisoners With Children
- Legal Aid Society-Employment Law Center

Connecticut
- Connecticut Legal Services
- New Haven Legal Assistance Association, Inc.
- Greater Hartford Legal Aid

Delaware
- Community Legal Aid Society
- Legal Services Corp of Delaware
- Delaware Volunteer Legal Services

Florida
- Jacksonville Area Legal Aid, Inc.
- Northwest Florida Legal Services, Inc.
- Florida Justice Institute, Inc.
- The Florida Bar Foundation
- Legal Services of Greater Miami, Inc.
- Florida Legal Services, Inc.
- Legal Aid Society of the Orange County Bar Association, Inc./Central Florida Legal Services, Inc.

Georgia
- Georgia Law Center for the Homeless
- Georgia Legal Services Program
- Atlanta Legal Aid Society
- State Bar of Georgia Pro Bono Project
- Atlanta Volunteer Lawyers Foundation

Idaho
- Idaho Legal Aid Services

Illinois
- Legal Assistance Foundation of Metropolitan Chicago
- Land of Lincoln Legal Assistance Foundation, Inc.

Indiana
- Indiana Pro Bono Commission
- Legal Aid Society of Evansville, Inc.

Iowa
- Muscatine Legal Services

Kentucky
- Volunteer Lawyers of Appalachian Kentucky

Louisiana
- The Advocacy Center
- Southeast Louisiana Legal Services
- New Orleans Legal Assistance Corp.
- AIDSLaw of Louisiana, Inc.

Maine
- Maine Equal Justice Partners/Project
- Pine Tree Legal Assistance
- Volunteer Lawyers Project

Maryland
- Maryland Volunteer Lawyers Service

Massachusetts
- National Consumer Law Center
- Massachusetts Justice Project
- Family Advocacy Program
- Massachusetts Legal Assistance Corp.

Michigan
- Center for Civil Justice
- Michigan State Bar Foundation

Minnesota
- Minnesota State Bar Association
- FLAG, Inc.

Missouri
- UMKC Entreprenuerial Legal Services Clinic
- Legal Aid of Western Missouri
- Legal Services of Eastern Missouri, Inc.

Nebraska
- Nebraska Legal Services

New Hampshire
- New Hampshire Legal Assistance

New Mexico
- State Bar of New Mexico, Pro Bono and Referral Division
- Advocacy, Inc.
- New Mexico Center on Law and Poverty
- Legal FACS
- Senior Citizens Law Office

New York
- Legal Aid for Broome & Chenango, Inc.
- Neighborhood Legal Services, Inc.
- Oak Orchards Legal Services, Inc.
- Greater Upstate Law Project

North Carolina
- North Carolina Prisoner Legal Services, Inc.
- North Carolina Justice and Community Development Center
- Carolina Legal Assistance
- Legal Services of Southern Piedmont
- Legal Aid of North Carolina

Ohio
Northeast Ohio Legal Services
Ohio Legal Assistance Foundation
Oklahoma
Legal Aid Services of Oklahoma, Inc.
Oregon
Legal Aid Services of Oregon
South Carolina
SC Appleseed Legal Justice Center
Tennessee
Tennessee Justice Center
Legal Aid Society of Middle Tennessee
Texas
Houston Volunteer Lawyers Program, Inc.
Legal Services of North Texas
Vermont
Vermont Legal Aid
Virginia
Legal Services Corporation of Virginia
Washington
Northwest Justice Project
Wisconsin
Legal Action of Wisconsin, Inc.

APPENDIX C

Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-558-0302

September 4, 2002

[REDACTED]*
Seattle, WA 98177

Dear [REDACTED],

It's probably the most important, certainly the hardest and longest-fought, effort in the history of Washington Legal Foundation. We are finally in a position we've fought more than a decade to reach - a position where we can deal a death blow to the single most important source of income for **radical legal groups** all across the country.

But even though victory is so close ... it's not over yet. Not by a long shot!

I'm talking about **IOLTA, Interest on Lawyers Trust Accounts**, the program *Forbes* once called "the legal left's most reliable source of income." **IOLTA** is the program in all 50 states under which lawyers are required to turn over any interest earned on their clients' trust accounts to a state-run group which then doles out the money to legal services groups.

We're not talking about pocket change, [REDACTED], we're talking about a staggering **$150 million a year!** And that is why this has been such a long, drawn-out, hard-fought battle. When we first started this fight back in 1991, nobody paid much attention.

---

* Information identifying the recipient has been redacted for privacy reasons.

But by the time we won our first U.S. Supreme Court victory in this matter, in 1998 in *Phillips v. Washington Legal Foundation*, **we faced organized opposition from 157 groups and individuals!** That's how serious this really is!

In its 1998 decision, the Court upheld our position that interest earned on **IOLTA** bank accounts is the private property of those whose funds generated the interest. That fact seems obvious, yet *it was disputed by every state in the nation.*

BUT ... the Court did not rule on our position that **IOLTA** violates the Fifth Amendment's Takings Clause, which prohibits the government from seizing private property without paying -compensation, even though that would seem equally obvious. The U.S. Supreme Court sent that matter back down to lower courts for resolution.

Now, after an incredibly difficult series of court battles, we have convinced the U.S. Supreme Court to make a final ruling on this all-important matter in *Washington Legal Foundation v. Legal Foundation of Washington.*

And the opposition threatens to dwarf the **157 groups** that filed against us in 1998! Naturally, the **American Bar Association** continues its position as the leader determined not to let us shutdown their money pump. *But they'll be joined by practically every **IOLTA** group and state bar association in the country, by legal aid societies and state legal services associations, by groups dedicated to the homeless, to minorities, to gay and lesbian causes, and any other group that has drawn money from hard-working Americans like you and me to support its **radical** cause!*

This is what we've been working for since 1991 and we **cannot, must not, will not,** let victory slip away from us now! Everyone at WLF is working around the clock preparing for our U.S. Supreme Court case and will continue to do whatever it takes to convince the Justices of the correctness of our position.

But **we need you** if we hope to stand up to those groups. Desperately. Loyal, caring, mainstream Americans like you have made it possible for us to get this far, and we need you *now* if we are to see this through to victory!

It's an abomination that **IOLTA** can take money that is rightly the property of Americans like you and me and use that money to support programs we oppose, that stand in direct opposition to everything we believe in.

They're not going to win! We've come this far and we're going to end this abominable program! We must! And we will ... ***if*** we can continue to count on wonderful, loyal friends like you.

Will you consider a contribution today of $100, $250 or even $500 to help us take this last great stride toward victory in the U.S. Supreme Court? If we can stop **$150 million** a year from going to these **radical legal groups**, it will be one of your most rewarding investments ever! Thank you.

Warm regards,

/s/ Dan
Daniel J. Popeo
General Counsel

DJP/hls

P.S. We don't know the exact date the U.S. Supreme Court will call this case, but there's so much to be done, it would really mean a lot if you could send your gift today. Thanks!